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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ED K. McDANIEL, WARDEN, ELY STATE PRISON, FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,
PETITIONERS,

-vs-

PATRICK CHARLES McKENNA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF ARIZONA ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Must a federal court conduct a harmless error analysis when it finds constitutional error during a capital sentencing proceeding based upon weighing of an invalid aggravating circumstance?

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INTEREST OF THE AMICI CURIAE

The Amici States are states where death-penalty statutes require the sentencing judge or jury to weigh statutory aggravating circumstances and mitigating circumstances in exercising discretion whether to impose the death penalty. They also include states in which a judicial determination whether they are weighing or non-weighing states has not yet been made. The Amici States have an interest in this case because they have an interest in the finality of their judgments. *See McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991); *Engle v. Isaac*, 456 U.S. 107, 126-28 (1982). The Amici States assert that when a federal court on habeas review finds constitutional error in the imposition of the death penalty, based on the use of an invalid aggravating circumstance in a weighing state (*see Clemons v. Mississippi*, 494 U.S. 741 (1990)), that court must determine if that error is harmless. If the federal court finds that the error was harmless, the state's interest in finality is preserved, with no prejudice to the prisoner's constitutional rights. The Ninth Circuit's refusal to do a harmless error analysis in this case will

waste judicial resources and cause completely unnecessary delay in the proceedings.

Also, the Amici States have an interest in this Court's enforcing its proscription of unwarranted delay in habeas proceedings, set forth in *In re Blodgett*, 502 U.S. 236, 240 (1992):

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In order to promptly resolve all of the issues presented by the case, the federal court finding constitutional error must decide whether that error was harmless.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant Certiorari To Address an Important Issue It Has Not Addressed—Whether Federal Courts Finding Constitutional Error During a Capital Sentencing Proceeding, Based on the Weighing of an Invalid Aggravating Circumstance, Must Determine Whether That Error Is Harmless.

In a weighing state, where the sentencer balances the aggravating and mitigating circumstances, it is constitutional error for the sentencer to have given weight to an unconstitutionally vague

aggravating circumstance, even if other valid aggravating circumstances remain. *Stringer v. Black*, 503 U.S. 222, 232 (1992). When the weighing process has been "skewed," only constitutional harmless error analysis or reweighing at the trial or appellate level is sufficient to guarantee that a defendant received an individualized sentence. *Id.*

This Court has never addressed whether a federal court finding such error must do a constitutional harmless error analysis. *See Williams v. Clarke*, 40 F.3d 1529, 1538 (8th Cir. 1994); *Smith v. Dixon*, 14 F.3d 956, 975 (4th Cir. 1994). However, Amici States submit that this Court's opinions regarding harmless error analysis inevitably lead to the conclusion that a federal court must do a harmless error analysis in such situations.

Since *Chapman v. California*, 386 U.S. 18, 22 (1967), this Court has provided for harmless error review of constitutional error. It has divided constitutional error into two kinds, "trial" error, and "structural" error, with the former being subject to harmless error review and the latter not. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1993); *Fulminante v. Arizona*, 499 U.S. 279, 307-08 (1991).

Trial error occurs during the presentation of the case to the jury; structural error is a defect in the constitution of the trial mechanism. *Fulminante*, 499 U.S. at 307–09. In habeas proceedings, the appropriate harmless error standard is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 113 S. Ct. at 1722, *quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946).[1]

This Court has already determined that the error at issue is not structural error, because it has held that state supreme courts in weighing states can determine whether such error is harmless. *Clemons*, 494 U.S. at 752–53; *Barclay v. Florida*, 463 U.S. 939, 958 (1983) (plurality opinion).[2] This rule is in accord with this

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1. If the federal court is in "grave doubt" about the harmlessness, it would find that the error was not harmless. *O'Neal v. McAninch*, 115 S. Ct. 992, 998 (1995).

2. This Court has also held in other contexts that constitutional error at sentencing is subject to harmless error analysis. *Satterwhite v. Texas*, 486 U.S. 249, 256–58 (1988) (error in evidence presented at sentencing); *Zant v. Stephens*, 462 U.S. 862, 888–89 (1983) (error by improperly designating an aggravating circumstance as a statutory aggravating circumstance (in a non-weighing state)). Certainly, whether constitutional trial error is such that it affected the determination of the prisoner's guilt, subjecting him to punishment, is as important as whether constitutional sentencing error affected the determination of that punishment. Also, a federal court can more easily determine the harmlessness of constitutional error at sentencing because that proceeding is, except in an unusual case, much shorter and simpler than the preceding trial.

Court's opinions holding that harmless error analysis applies to erroneous jury instructions at trial. *Pope v. Illinois*, 481 U.S. 497, 503-04 (1987); *Rose v. Clark*, 478 U.S. 570, 583-84 (1986).[3] Accordingly, a federal habeas court finding the error at issue *must* determine whether such error was harmless, applying the *Brecht* standard.

The necessity of harmless error analysis of such error is also indicated by this Court's recent opinion in *Tuggle v. Netherland*, 116 S. Ct. 283 (1995), which found constitutional error at sentencing (in a non-weighing state), but remanded to the Fourth Circuit for further proceedings because neither that court nor the state court had done a harmless error analysis. 116 S. Ct. at 285. This Court found that *Ake*[4] error at Tuggle's sentencing prevented him from contesting the state's psychiatric evidence and from presenting his own mitigating evidence. *Id.* It explained that *Zant v. Stephens* does not hold that a death sentence from a non-weighing state is automatically affirmed

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3. The only exception to this general rule is the erroneous definition of the essential concept of "reasonable doubt." *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993). No such error is presented in this case.

4. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

even if there are one or more valid aggravators remaining after an invalid aggravator has been stricken. *Id.* This Court said it had affirmed the sentence in *Zant v. Stephens* because there were two remaining and "unimpeachable" aggravators, and no claim that inadmissible evidence had been presented to the jurors or that the defendant had been precluded from presenting relevant mitigating evidence. *Id.*

Justice Scalia's concurrence, while disagreeing with the Court's treatment of the case as an "invalid aggravator" case rather than as an "impermissible evidence" case, agreed that remand was appropriate "to allow the Fourth Circuit to review the case under the harmless error standard appropriate to collateral review [the *Brecht* standard]." 116 S. Ct. at 286. The majority opinion made no reference to Justice Scalia's citation to the *Brecht* standard.

After *Tuggle*, this Court would draw a curious distinction if it held that federal courts must analyze whether constitutional error in the consideration of an invalid aggravator was harmless when the case is from a non-weighing state, but need not or cannot when the case is from a weighing state. This Court should take review of this

case to make clear that federal courts must apply a uniform standard of harmless error review (the *Brecht* standard) in habeas proceedings when such error is found, regardless of whether the prisoner is in a weighing state or in a non-weighing state.

The federal circuits are in conflict whether they should do a harmless error analysis in this situation, and if they do, whether they should apply *Brecht* or *Chapman*. *Compare Williams*, 40 F.3d at 1538 (doing harmless error analysis, but applying *Chapman* standard), *Dixon*, 14 F.3d at 975 (doing harmless error analysis and applying *Brecht* standard), and *Marek v. Singletary*, 62 F.3d 1295, 1303 (11th Cir. 1995) (doing harmless error analysis and applying *Brecht* standard) with *Wiley v. Puckett*, 969 F.2d 86, 94 n.8 (5th Cir. 1992) (declining to do harmless error review). Indeed, the Ninth Circuit itself appears unsure whether to do a harmless error analysis in such cases. *Compare McKenna v. McDaniel*, 65 F.3d 1483, 1489-90 (9th Cir. 1995) (not doing harmless error analysis) *with Williams v. Calderon*, 52 F.3d 1465, 1476 (9th Cir. 1995) (citing *Brecht* as proper standard of review for harmless error analysis for error in sentencing instructions in weighing states, but

deciding that California was not a weighing state when the prisoner was sentenced).

Accordingly, Amici States urge this Court to take review and declare that federal courts must do a harmless error analysis in this situation. The Ninth Circuit erred by not determining whether the constitutional error it found in this case was harmless.

B. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE JUDICIAL EFFICIENCY IN BOTH THE FEDERAL AND STATE COURTS.

A second reason for this Court to take review of this case is the practical effect of a federal court's failure to do the harmless error analysis. Amici States submit that requiring the federal court to do the analysis avoids wasting scarce judicial resources, at both the state and federal level. Moreover, such judicial efficiency is achieved with no detriment whatever to the prisoner's constitutional rights.

At first glance, the Amici States' position might seem to run contrary to their interest in federalism. However, because the federal court can promptly and efficiently determine the issue of harmlessness of federal constitutional error, and because there is no issue of state law to be determined by the state court, there is no

state interest in federalism in such situations. *Cf. Stringer*, 503 U.S. at 235 ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law.").

1. The Federal Court Will Likely Have to Make the Determination Later Anyway.

It makes no sense for the federal court not to make a determination now that it will likely have to make later. If the federal court does not do the harmless error analysis, the matter generally goes back to the state supreme court. Under *Clemons*, that court can do a harmless error analysis, or it can reweigh. 494 U.S. at 748–49. Logically, that court will first do a harmless error analysis, because there is no need to engage in a reweighing process if the error was harmless. If the state supreme court finds the error was not harmless, it has spent some time deciding an issue (after several months, maybe longer), that the federal court could have already decided.

If, on the other hand, the state supreme court finds the error was harmless, the matter then heads back to federal district court for

another round of habeas review.[5] After the federal district court has spent some time deciding the issue, it will then go up to the federal court of appeals, which will then be the third court to spend time deciding an issue that should already have been decided.

The issue of whether constitutional error is harmless is a question of federal law. *Rushen v. Spain*, 464 U.S. 114, 120 (1983); *Chapman*, 386 U.S. at 20–21. Because it is an issue of federal law, both the federal district court and the federal court of appeals will examine the harmless error issue *de novo*. *Fulminante*, 499 U.S. at 295; *Marshall v. Lonberger*, 459 U.S. 422, 431–32 (1983). To put it another way, because it is not a factual issue, the federal courts will not show deference to the state court's ruling under 28 U.S.C. § 2254(d); *Thompson v. Keohane*, 116 S. Ct. 457, 463–65 (1995); *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963). Also, of course, because review is *de novo*, the federal appellate court will not defer to the ruling by the federal district court. Moreover,

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5. Such review is, for all intents and purposes, automatic in capital cases, because capital prisoners are entitled to counsel under 21 U.S.C. § 848 (q)(4)(B). *See McFarland v. Scott*, 114 S. Ct. 2568 (1994).

because this is an issue of federal law, all three courts will be applying the same federal law of harmless error.[6]

So nothing is gained by sending the issue back to state court—at the cost of having three separate courts, one state and two federal, independently decide the very same issue of law that should have already been decided by the federal court finding the constitutional error in the first place. The other significant cost is that the issue will not be finally decided until several years after it should have been decided. This is a gross and inexcusable waste of both state and federal judicial resources, not to mention taxpayers' money.

Furthermore, there is a question of political accountability. The federal court should make the decision on the issue of federal constitutional law. Remand to the state supreme court makes it look like that court is responsible for the delay in the proceedings. If the state court finds the error was not harmless, it takes the "political heat" for a decision that the federal court should have made. In

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6. The state court will apply federal law because of the Supremacy Clause of Article VI of the United States Constitution. One question might be whether the state court would apply *Chapman* or *Brecht* as its standard for harmless error review. This again shows the dilemma the state courts are faced with by the federal court's failure to do its job.

addition, after the state court decides the harmlessness issue, when the matter finally gets back to a federal court, that court may well look askance at the protracted proceedings, despite the fact that a federal court's (maybe the same court's) failure to do the harmless error review unnecessarily contributed to the protraction. From a broader perspective, this delay adds to the public's frustration with the length of capital proceedings and defeats the states' and victims' interests in the finality of criminal judgments.

Also, for a federal court to send the matter back to the state supreme court for a reasoned determination of the harmless error issue, when the state court's ruling on the issue will receive no deference whatsoever in federal court, treats the state supreme court as the lackey of the federal court system. The federal court is requiring the state supreme court to devote its time and resources to render a useless decision. It is the judicial analogy to the old Army training of having a recruit dig a hole and then fill it back up. As this Court said in *Engle v. Isaac*:

> [T]here is "nothing more subversive of a judge's sense of responsibility, on the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well,

than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."

456 U.S. at 128–29 n. 33, *quoting* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963).

2. If the Federal Court Does Not Make the Harmless Error Analysis, the State Court Is Unsure How To Proceed.

A second practical problem emerges if the federal court does not do a harmless error analysis. The state supreme court does not know on remand what to do with the case. Under *Clemons*, it has the options of doing a harmless error analysis, reweighing, or sending the matter back to the state trial court. However, that court may realize, for the reasons discussed above, that the decision it makes on the harmless error issue will be of no real consequence. To avoid wasting its time, the state supreme court may forego the harmless error analysis it is entitled to do under *Clemons*, and either do an unnecessary reweighing or an unnecessary remand to the trial court for an entirely new sentencing hearing. All of this needless uncertainty and delay is generated by a federal court's failure to do

its job—determining the federal legal issue of the harmfulness or harmlessness of constitutional error.

The Ninth Circuit's opinion in this very case indicates the uncertainty that a state supreme court may face. The Ninth Circuit labels its discussion of this issue as "Requirement to Reweigh." 65 F.3d at 1489. Later, however, citing *Clemons*, the court recognizes that the state court can either reweigh or conduct a harmless error analysis. *Id.* Nevertheless, the court later states, "Thus, under *Clemons*, McKenna must be resentenced in a proceeding where the remaining valid aggravating factor found by the jury is *weighed* against the mitigating evidence." *Id.* at 1490 (emphasis added). Thus, having failed to do a harmless error review itself, the Ninth Circuit appears to have *foreclosed* the state supreme court from doing a harmless error review. If the Ninth Circuit had done its job, by doing the harmless error analysis, there would be no such uncertainty (and indeed no remand at all if it found the error was harmless).

C. THIS COURT SHOULD TAKE REVIEW TO ENSURE COMPLIANCE WITH *BLODGETT*.

This Court has stated that, "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Issac*, 456 U.S. at 128. It should take review of this case to enforce its proscription of senseless delay in habeas proceedings, set forth in *Blodgett*, 502 U.S. at 240. Requiring the federal courts in cases such as this one to do a harmless error analysis would put flesh on the *Blodgett* bones.

In *Blodgett*, this Court considered the Ninth Circuit's 2½-year stay of the execution of a Washington prisoner, occurring after it had heard oral argument on appeal from the denial of his second petition for writ of habeas corpus. This Court expressed concern that the State of Washington had sustained "severe prejudice" because it had been prevented from "exercising its sovereign power to enforce the criminal law." 502 U.S. at 239. It found that, given the potential for prejudice, "the Ninth Circuit was under a duty to consider Campbell's claim for relief without delay." *Id.* This Court held:

> The delay in this case demonstrates the necessity for the rule that we now make explicit. In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

502 U.S. at 240.

First, *Blodgett* requires federal courts to "take all steps necessary to ensure a prompt resolution of the matter." *Id.* If a federal court can resolve a matter now that it will likely have to resolve later, it must resolve it now to ensure a "prompt resolution of the matter." There are some cases that cry out for imposition of the death penalty,[7] and some that are close calls. In this case, the Ninth

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7. For instance, can there be any doubt that the prisoner in the Eighth Circuit case of *Williams* would have been given the death penalty absent the use of an invalid aggravator? Williams, on the first day, raped and murdered two women; on the second day, he raped and murdered another woman; and on the third day, he kidnapped a man and kidnapped and raped a woman. 40 F.3d at 1531-32. Williams was convicted and given two death sentences in the trial for the murders of the first two women. Although finding that one of the instructions regarding an aggravating circumstance given at sentencing was unconstitutionally vague, the Eighth Circuit concluded that it had the authority to do a harmless error analysis, but that *Chapman* rather than *Brecht* was the applicable standard of review. It found that, "the overwhelming force of the evidence . . . convinces us beyond a reasonable doubt that the sentencing panel's improper inclusion of the unconstitutionally vague phrase . . . did not alter the balance." 40 F.3d at 1542. The Eighth Circuit's opinion shows that federal courts are perfectly capable of determining whether such error was harmless, and that the Ninth Circuit shirked its duty by not determining whether the error in this case was harmless.

Circuit should have done the harmless error review after finding constitutional error in order to ensure a prompt resolution of this matter.

Moreover, as a matter of efficiency, what better time and what better court to do the harmless error analysis than the federal court just after it has reviewed the record and has a fresh memory of this case? By contrast, the state supreme court doing a harmless error review on remand will have to read the entire record again in a case that it considered several years earlier.

Second, *Blodgett* requires a federal court to give full and fair consideration to *all* of the issues presented by the case. Obviously, if the court has found the state's reliance on an aggravating circumstance to be constitutional error, the case then squarely presents the legal issue of whether the error is harmless. *See Brecht*, 113 S. Ct. at 1722 (habeas petitioners not entitled to habeas relief based on trial error unless they can establish the error resulted in "actual prejudice"). Because the Ninth Circuit did not decide the harmless error issue, it did not fully and fairly consider all of the issues presented to it by this case. If the error is harmless, the

federal court must make that decision, rather than causing senseless delay by "punting" the matter back to the state courts. A federal court finding constitutional error at a capital sentencing must decide if that error was harmless.

CONCLUSION

For above reasons, Amici States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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